IN THE

Supreme Court of the United States

No. 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE FAR WEST SKI ASSOCIATION AND THE UNITED STATES SKI ASSOCIATION AS AMICI CURIAE

DONALD R. ALLEN
PATRICK H. MITCHELL
DUNCAN, ALLEN and MITCHELL
1775 K Street, N.W.
Washington, D.C. 20006
Attorneys for Amici Curiae

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Far West Ski Association, a division of the United States Ski Association, and the United States Ski Association respectfully move this Court for leave to file the accompanying brief, Amici Curiae, in this proceeding. The attorneys for the respondents have consented to the filing of this brief, but the attorneys for the petitioner have refused.

The Far West Ski Association, a division of the United States Ski Association is comprised of over 31,000 members living in California, Arizona, Nevada and Hawaii. The United States Ski Association, formed in 1904, is a nationwide organization with over 132,000 members. Both associations are non-profit, volunteer organizations comprised of members

who are keenly interested in recreation and competition skiing. Members of both associations hold responsible positions in Federation Internationale de Ski, the governing body for world-wide amateur ski competition. The United States Ski Association is the sole sponsor for the United States Ski Team, this nation's representative in international amateur ski competition around the world.

The issues presented in this case vitally effect the interests of the members of the Associations. The great majority of important ski areas in the United States depend upon the permit authority of the Secretary of Agriculture which is under attack here. Should the petitioners prevail before this Court and bring into question the authority of the Secretary of Agriculture to authorize ski areas in national forests, the members of the Associations will suffer irreparable harm. Not only will their opportunities for skiing be jeopardized but the United States Ski Association's ability to field the United States Ski Team in the future will be seriously affected to the extent that less ski opportunities are available for the training of future amateur competition skiers.

The Associations have played an active and useful role in this litigation while it was in the lower courts and were granted leave to file a brief amici curiae on the petition for certiorari herein. The Associations do not believe that the issues were adequately presented by the parties below, particularly with respect to the authority of the Secretary of Agriculture, and seek to fully develop the background and legislative history of that authority for the benefit of this Court. The Associations therefore respectfully request leave of this Court to file their annexed brief Amici Curiae in this proceeding.

Respectfully submitted,

Donald R. Allen
Attorney for Amici Curiae

August, 1971

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BRIEF OF THE FAR WEST SKI ASSOCIATION AND THE UNITED STATES SKI ASSOCIATION AS AMICI CURIAE

By leave of this Court, the Far West Ski Association, a division of the United States Ski Association, and the United States Ski Association file this brief as Amici Curiae, in conjunction with consideration of this case.

INTERESTS OF AMICI CURIAE

The Far West Ski Association, a division of the United States Ski Association is comprised of over 31,000 members living in California, Arizona, Nevada and Hawaii. The United States Ski Association, formed in 1904, is a nationwide

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STATEMENT

The Sierra Club filed suit on June 5, 1969, in the United States District Court for the Northern District, California to enjoin the Secretaries of Agriculture and Interior from issuing permits to enable Walt Disney Productions, Inc., to develop a winter sports facility in Mineral King Valley, part of the Sequoia National Forest (A. 3). The Sierra Club's motion for a preliminary injunction was granted on July 23, 1969, upon the contention that irreparable harm would occur to the public interest should the government be allowed to proceed with its plans (A. 186). It was alleged that the Secretary of Agriculture lacked authority to permit the development of a winter sports facility in Mineral King Valley and that the Secretary of the Interior lacked authority to issue

permits to improve an access road to Mineral King which crosses Sequoia National Park and to construct a transmission line to serve Mineral King across Sequoia National Park.

On interlocutory appeal, the United States Court of Appeals for the Ninth Circuit vacated the order granting the preliminary injunction, concluded that the Sierra Club lacked standing to bring suit, and found that the Sierra Club had neither shown with any degree of certainty that it would prevail on the merits nor that it or anyone else would suffer irreparable injury, 433 F.2d 24 (1970) (A. 208). The Sierra Club petitioned this Court for certiorari, which was granted February 22, 1971.

SUMMARY OF ARGUMENT

While Amici Curiae take no position on the issue of whether or not the Sierra Club has standing to bring this action, we would caution the Court to carefully consider the ramifications of its decision. Certainly the standing doctrine has created a barrier inside which the executive branch has carried on its business with very little accountability to the citizens it serves. If this Court expands judicial review of executive branch action by its decision in this case it must be careful at the same time not to create a situation in which the government is no longer able to fulfill its responsibility to effectively manage the nation's resources for the benefit of all citizens. Should the Court find that the Sierra Club has standing to sue, this Court may then properly make final disposition of the issues raised because they involve only questions of the scope of administrative authority which require no trial to resolve.

On the merits, the authority of the Secretary of Agriculture to issue term permits and revocable permits for the development of a winter sports facility at Mineral King Valley in the Sequoia National Forest is challenged. Similar permits have been issued both separately and together in the same manner proposed here for over forty years pursuant to clear legislative authority. Without taking issue with this proposi-

tion, the Sierra Club argues that acreage limitations enacted for term permits somehow create an implied acreage limitation on revocable or combined term-revocable permits. Not only is such an implication contrary to the plain meaning of the statute but it is outside any construction of the histories of legislation authorizing term and revocable permits. Moreover, Congress was aware of the distinction between the two types of authority when it expanded the Secretary of Agriculture's power to issue term permits in 1956 and it was fully informed that ski areas in national forests, then under combined term-revocable permits, covered as much as 400 acres in some instances.

In addition to its claims regarding the Secretary of Agriculture's general permit authority, the Sierra Club erroneously contends that the legislation establishing the Sequoia National Game Refuge further limits the Secretary's authority in this case. The legislation which established the Refuge simply declared the area off limits to hunters and trappers, in part for the safety of the people who have used Mineral King for recreation purposes for over 50 years and it may not be construed to prohibit the development of a winter sports facility at Mineral King.

The Sierra Club also erroneously contends that the Secretary of the Interior lacks power to authorize a transmission line and road improvement in Sequoia National Park, both of which are to serve Mineral King. The prohibition against transmission lines in Sequoia National Park relied upon by the Sierra Club is in fact only a prohibition against hydroelectric development, analogous to similar prohibitions contained in legislation establishing or expanding 15 other national parks and in no way restricts the authority of the Secretary to permit construction of the transmission line proposed here. The "prohibition" against roads in national parks, relied upon by the Sierra Club, is likewise not a prohibition against what is proposed in this case. Here an existing road would only be improved. The improvement has been found to be appropriate in the judgment of the Secre-

tary of the Interior after detailed study and consideration and is entirely within the power of the Secretary to authorize.

Essentially, we have here a case where the executive branch has been empowered to exercise broad discretion in the management of the nation's natural resources. The substance of the claims raised here by the Sierra Club amounts to a disagreement with the exercise of that discretion to develop the winter recreation potential of Mineral King. The issue for this Court, however, is not whether the Sierra Club or anyone else believes Mineral King should be developed as a winter sports facility, but whether the Secretaries of Agriculture and the Interior are empowered to authorize such a facility at Mineral King. The statutes relied upon grant that power and no other statute pointed to limits the authority to be exercised here. Thus, the Court is compelled to dismiss the Sierra Club's claim and affirm the Ninth Circuit.

ARGUMENT

I

THE ISSUE OF STANDING MUST BE APPROACHED WITH CAUTION AND WITH A VIEW TO THE FAR REACHING RAMIFICATIONS OF THE COURT'S DECISION IN THIS CASE

Amici Curiae take no position on the question of the Sierra Club's standing to sue. However, we cannot fail to take note of the extensive discussion standing has received in this case to date. Accordingly, we offer the following comments for the benefit of the Court in its deliberations.

The concept of standing to sue was born in an era where the ambit of governmental activity was, by the nature of things, more limited than it is today. In those early days most individuals had little time for concern with governmental activities which today engage the attention and energy of so many. This is especially true in the field of natural resources.

The growth of the concept of standing left behind it an intricate path of legal history from the early days of *Massachusetts v. Mellon*[1], through *Tennessee Electric Power Co. v. T.V.A.*[2], *Poe v. Ullman*[3], *Baker v. Carr*[4], *Flast v. Cohen*[5], and *Association of Data Processing Service Organizations, Inc. v. Camp*[6], to *Citizens to Preserve Overton Park v. Volpe*[7]. Looking back over this path it is apparent that in many instances the result of the standing doctrine has been to erect barriers around governmental activity to the point where many patriotic citizens candidly ask if there is anyone who can challenge the government for an accounting. Perhaps the Court will conclude that in this case there is someone who can demand that accounting.

In finding a solution to this dilemma, though, Amici Curiae earnestly caution against creating a situation where not only is the government held to an accounting but where the government will be besieged in the future by those who would substitute their judgment for the government's judgment to the point where it can no longer fulfill its responsibilities to its citizens.

This word of caution is particularly relevant to questions involving the management of the nations' natural resources. Policy must be established and honored by administrators but legislated policy is only a starting point. Administrators must face the hard questions of natural resource management and reconcile often competing interests within the legal authority granted them. Those who would oppose a particular land use decision must be heard but the government

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[1]262 U.S. 447 (1923).

[2]306 U.S. 118 (1939).

[3]367 U.S. 497 (1961).

[4]369 U.S. 186 (1962).

[5]392 U.S. 83 (1968).

[6]397 U.S. 150 (1970).

[7]39 U.S.L.W. 4287 (U.S. March 2, 1971).

must also be allowed to implement its decision in a reasonably expeditious manner. The barrier termed "standing to sue" which has been erected around governmental activity, if removed, must be removed in such a manner that the government can continue to fulfill its responsibility to manage the nation's resources. Administrators must be held to act within the scope of authority provided them, but likewise, actions which they take within that scope of authority must not be subjected to protracted litigation for the sole purpose of forcing "another look" at the decision already reached.

This law suit was filed more than two years ago. At least another six months will elapse before a decision can be expected and at that point the case will not even have gone to trial. Some attention must be paid by this Court in reaching its decision to the future vitality of administrative decision making. The Court must avoid the pitfall of establishing a legal principal which would cripple the government as a whole by over involving the judicial branch in the activities of the executive branch.

II

THIS COURT IS THE PROPER FORUM FOR FINAL DISPOSITION OF THE ISSUES IN THIS CASE

Very recently this Court definitively addressed the problems associated with judicial review of the merits of cases where administrative action is challenged. *Citizens to Preserve Overton Park v. Volpe*, supra. In that case the Court decided that grave questions had been raised about the propriety of administrative action and articulated important guidelines to be followed by the judiciary in reviewing administrative action.

The Court held that the Administrative Procedure Act generally guarantees judicial review of administrative action. As for the exception to judicial review in instances where "agency action is committed to agency discretion by law," 5 U.S.C. 701 (Supp. V), the Court found it to be "a very

narrow exception."[8] The Court stated that where there is law to apply, the agency discretion exception to judicial review is inapplicable.

Where review is appropriate, the Court next addressed the problem of the standard of review to be used. In certain narrow, limited situations involving rule makings or adjudicatory hearings, a substantial evidence test is to be used. 5 U.S.C. 706(2)(E)(Supp. V). In other equally narrow situations involving inadequate fact finding procedures in adjudicatory hearings or where new issues are raised in enforcing a nonadjudicatory agency action, a *de novo* review is authorized. 5 U.S.C. 706(2)(F)(Supp. V). But where neither of these situations exists (as in the instant case), the Court announced the general rule that 5 U.S.C. 706 (Supp. V) "requires the reviewing court to engage in a substantial inquiry," while at the same time according the administrative agency's decision a presumption of regularity.[9]

The key question which then faced the Court was *how* this substantial inquiry may be accomplished. In *Overton Park* the Court had before it a situation where the administrative agency was required by statute[10] to engage in an extensive hearing and fact finding process prior to reaching a decision. Detailed statutory criteria existed by which the appropriateness of the administrator's judgment could be measured by the reviewing judicial authority. Thus, the Court decided that under those circumstances the case should be remanded for the further consideration of the trial court.

A full blown trial on the merits is not, however, the only method of conducting the substantial inquiry required by 16 U.S.C. 706. In articulating the substantial inquiry test in *Overton Park* the Court relied upon two of its earlier decisions. One of those cases, *Pacific States Box and Basket Co. v. White*, 296 U.S. 176 (1935), involved no more trial court

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[8] 39 U.S.L.W. 4287, 4290.

[9] *Ibid.*, at 4291.

[10] 49 U.S.C. 1653 (Supp. V); 23 U.S.C. 138 (Supp. V).

action than has been accorded this case to date, yet that case was fully disposed of by this Court. There the Court affirmed an order of the District Court dismissing plaintiff's motion for a preliminary injunction on the grounds that the complaint did not state sufficient facts to entitle the plaintiff to relief. The case was disposed of without trial by this Court.

The conclusion to be reached is that not all challenges to administrative action must reach the trial stage. In *Overton Park* a trial was necessary because the judgment of the administrator was at issue and detailed statutory criteria existed whereby the Court could measure his performance. In *Pacific States* where the substance of the claim was whether the administrator acted constitutionally and within the scope of his authority, no trial was ordered. Likewise here, where the substance of the claim made by the Sierra Club in its complaint is that the administrators acted beyond the scope of their authority and where this Court need not engage in an inquiry into the subjective judgments reached by the administrators to rule on the validity of the Sierra Club's claim, no trial is necessary and this Court is competent to dispose of all claims.

Amici Curiae have therefore set out to describe in detail the actual scope of statutory authority granted the administrators which the Sierra Club alleges they have exceeded. Amici Curiae submit that from the statutes alone, when put in the proper perspective by their legislative history, the clear limits of the administrative authority may be determined and the legality of the acts complained of by the Sierra Club may be judged. In each instance in this case the administrators possess the authority which has been challenged. It goes without saying that the Sierra Club would have exercised that authority differently were it the administrator. The question for this Court, however, is not which decision the administrator reached, but whether he had the authority to reach a decision. If so, this Court must affirm the Court of Appeals order vacating the injunction and order the District Court to dismiss the complaint.

III

THE SECRETARY OF AGRICULTURE HAS AUTHORITY TO PERMIT THE DEVELOPMENT OF A WINTER SPORTS FACILITY ON NATIONAL FOREST LAND

The Constitution vests general power over federal land in the legislative branch. Article IV, Section 3 declares that, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . ." According to this Court, the scope of that authority is unlimited.

> "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. *That power is subject to no limitation.*" (*Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871). (Emphasis added).

The Mineral King winter sports facility, to be developed by private persons, is proposed to be located on federal land within the Sequoia National Forest. Mineral King depends upon whether or not Congress has empowered the executive branch to permit such a development on federal land. Specifically at issue is the Secretary of Agriculture's authority to issue two permits—a term permit and a revocable permit—which would authorize private persons to occupy and develop the Forest Service land. The authority under attack here has been widely used by the Secretary of Agriculture to permit construction of 84 other winter sports facilities. A list of those areas is contained in Appendix B to this brief.

A. The Revocable Permit

Congress originally delegated its power to manage the national forests to the Secretary of the Interior by passing the Organic Administration Act of June 4, 1897, 30 Stat. 35. The Act provided that the Secretary, in addition to protecting national forest reservations from harm by fire or other causes, ". . . may make such rules and regulations and establish such service as will insure the objects of such

reservations, namely, to regulate their occupancy and use to preserve the forests thereon from destruction." This regulatory power was transferred to the Secretary of Agriculture in 1905, 33 Stat. 628, and still serves today as the source of much of the Secretary of Agriculture's authority to manage national forests, including his broad authority to issue revocable use and occupancy permits. 16 U.S.C. 551.

As early as 1911 the Secretary's authority to issue revocable permits was challenged. *United States v. Grimaud*, 220 U.S. 506 (1911). This Court, in upholding the Secretary's authority to issue revocable permits, stated that the terms and conditions of the permit requirements then under attack were matters of administrative detail and found that, "in the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management." 220 U.S. 506 at 516.

The Attorney General commented on the significance of the Secretary's power to issue revocable permits in 1914 and noted the reliance that even then was place in them.

> "During the nine years last passed the Secretary of Agriculture has assumed and executed the task of regulating the use and occupation of the forest, pursuant to the Act of 1897, *supra*, and therein has promulgated and from time to time revised elaborate rules and regulations, and issued and reissued innumerable permits for grazing (*United States v. Grimaud*, 220 U.S. 506, 522; *Light v. United States*, *id.* 523), and for other particular uses, which involve the occupation or usufructuary enjoyment of designated areas by the beneficiaries, to the exclusion of other persons. In like manner he has made his regulations under the act of 1901, and has issued in large numbers the revocable licenses therein authorized. Important enterprises have been founded upon the faith of such licenses. *Millions of dollars have been expended in the construction of various kinds of plants in reliance upon the authority of the Secretary of Agriculture to permit their erection and*

operation within the forest reservations." (30 Op. Atty. Gen. 263, 268-269 (1914) (Emphasis added).

Thus, at a very early stage in the Secretary of Agriculture's exercise of his responsibility to administer and manage national forest lands (and prior to his possession of any authority to grant term permits), his discretionary authority to issue revocable use and occupancy permits was sanctioned and construed broadly by this Court. Many revocable permits had been issued based upon that authority and substantial investments had been made in reliance thereon. Nothing has occurred since these early days to deprive him of his authority. The Secretary may, therefore, in this case issue the revocable permit and the fact that persons rely on that permit and construct facilities pursuant thereto is nothing novel.

B. The Term Permit

By 1913, it became evident that facilities requiring substantial capital investment would have to be constructed if people were to enjoy any but the most primitive recreation uses of forest land. Whether airport hangars and runways or resort hotels, these capital improvements required long term financing which in turn required the borrower to possess some fixed interest in the land upon which the facilities would be constructed. To meet this need, Congress conferred upon the Secretary of Agriculture the power to issue "term" permits guaranteeing the permittee secure tenure over a fixed parcel of land for a term of years. The legislative history of the Secretary's term permit authority, detailed below, demonstrates that his authority to issue term permits is separate from and in addition to his authority to issue revocable permits. The sole purpose of the term permit was to cure the problem of inadequate land tenure necessary for long term financing of privately constructed improvements on Forest Service land. The enactment of the term permit authority, with its acreage limitation, in no way circumscribed the authority of the Secretary to issue revocable permits.

The Secretary of Agriculture first requested authority to grant secured tenure to national forest land in 1913 in conjunction with this appropriation request for fiscal year 1915. The 1913 proposed legislation would have given the Secretary general rental and lease power ". . .for the purpose of increasing the public benefits or public use of national forests" without limitation on size of parcel or length of term. Henry S. Graves, Chief Forester, first explained the purpose of the 1913 proposed legislation to the House Committee on Agriculture on December 12, 1913 as follows:[11]

> "MR. GRAVES. The purpose of [the proposed legislation] is to enable the Secretary of Agriculture to issue term permits for the use of national forest land, where there are considerable investments involved, which the ordinary investor is unwilling to make on the basis of a revocable permit. The most conspicious example is the erection of summer hotels. There is no authority at the present time, except in the case of mineral springs, to grant a term permit for the use of land for the erection of hotels. In the case of mineral springs, we have a special act which recognizes this situation and gives authority to grant a term permit for not to exceed 20 years. We have constantly applications for the erection of hotels near lakes and in places of unusual scenic beauty, but a revocable permit does not give a sufficient security to a man to invest the amount of money which would be ordinarily required.
>
> "MR. McLAUGHLIN. Do you propose to give here a revocable permit that is a gift, or a sale?
>
> "MR. GRAVES. I think there should be language in here which would restrict the length of time; say, for a period not to exceed 20 or 30 or 40 years, as may seem desirable. There is authority in the case of national parks to grant permits for not to exceed 20 years for the erection of hotels."

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[11] *Hearings on H.R. 13679 before the House Committee on Agriculture and Report on the Bill,* 63rd Cong., 2nd Sess., at 302-303 (1914).

The bill, when finally reported by the House Agriculture Committee, included term permit authority[12] for periods up to 20 years but without any acreage limitation. The Committee's Report adopted the rationale of the Forest Service that the additional authority was necessary for permittees to acquire financing for capital facilities. The Report states:[13]

> "*Rent or lease of land within national forests* (page 39, line 22).—This is a new paragraph. Under existing law the Secretary of Agriculture is authorized to permit the occupancy of national forest land for any use not inconsistent with the purposes for which the forests are created, but the permission to occupy such land may be terminated at any time in the discretion of the Secretary. Such permits are sufficient to meet the public needs when the use of land does not involve expenditures of any considerable sum of money in the erection of buildings or other improvements on the land. When, however, the use of the land necessitates the investment of considerable sums, as for example, in the erection of hotels, stores, and other business structures or summer residences, other buildings for recreation, the revocable permit offers a serious difficulty, which can be readily overcome by extending the authority of the Secretary to the granting of leases for definite periods. The adoption of this paragraph will increase the public benefits and public uses of the national forests."

The 1913 proposed legislation was deleted from the appropriation bill in floor debate in both Houses on points of order.[14] The acreage limitation was considered, however, in the Senate during debate on the bill prior to it being killed. It is clear from this debate that the acreage limitation was meant to apply only to the term permit authority and was

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[12]H.R. 13679, 63rd Cong., 2nd Sess., 51 Cong. Rec. 4771-2 (1914).

[13]H. Rep. No. 295, 63rd Cong., 2nd Sess. (*supra*, note 11), at 692.

[14]House, 51 Cong. Rec. 4771-2 (1914); Senate 51 Cong. Rec. 9101 (1914).

not introduced to place any limitation on any other powers of the Secretary of Agriculture.[15]

"MR. CLARK of Wyoming. What Senator offers the amendment. [i.e. the 1913 legislation granting term permit authority].

"The VICE PRESIDENT. The Senator from Washington [Mr. Jones].

"MR. JONES. I will simply say that this is a provision that was in the bill when it was reported to the House from the Agricultural Committee. It went out on a point of order. The sole purpose of it is substantially this: In many of the forest reserves there are what may be termed 'camps,' summer sites, that could be leased and would be leased if the Secretary of Agriculture had authority to do it for a reasonable time, and houses put up and looked after. The purpose of this amendment is simply to give the Secretary of Agriculture authority, on petition from proper persons, to make such leases as he may deem advisable.

* * * * *

"MR. GALLINGER. Mr. President, I notice that in the amendment there is no condition as to the amount of land that may be leased to these people. I suppose the Department of Agriculture might let them have a hundred acres or 50 acres or any other amount.

"MR. JONES. That is true, and that had occurred to me, and I spoke about it to one of the Members of the House who was especially interested in the matter. I should have no objection myself to limiting the amount. I have offered the amendment just as it was reported by the Agricultural Committee of the House.

"MR. GALLINGER. What amount would the Senator suggest?

"MR. JONES. I should say 10 acres.

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[15] 51 Cong. Rec. 9101 (1914).

"MR. GALLINGER. I will offer that amendment to the amendment, '*Provided*, That the amount shall not exceed 10 acres.'

"MR. SMITH of Georgia. Mr. President, what is the matter that is pending in the shape of a proposed amendment?

"MR. JONES. I ask that the amendment may be read.

"MR. SMITH of Georgia. Yes; I should like to have it read.

"The VICE PRESIDENT. The Secretary will state the amendment.

"The SECRETARY. The Senator from Washington [Mr. JONES] proposes the following amendment, to be inserted on page 40, after line 5:

> That hereafter the Secretary of Agriculture may, when necessary for the purpose of increasing the public benefits or public use of the national forests, rent or lease to responsible persons or corporations, for periods of not to exceed 20 years, suitable spaces or portions of ground for the construction of summer residences, hotels, stores, or any structures needed for recreation or convenience.

The amendment suggested by the senior Senator from New Hampshire [Mr. GALLINGER] is, on line 4, after the word 'corporations,' to insert 'not to exceed 10 acres,' so as to read:

Rent or lease to responsible persons or corporations not to exceed 10 acres—

And so forth."

The following year, in December of 1914, the House Agriculture Committee again recommended that the Secretary of Agriculture be granted authority to issue term permits in its report on the agriculture appropriation bill for fiscal year 1916.[16] This time the legislation passed and the Secretary was granted authority to issue term permits to construct

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[16]H. Rep. No. 1255, 63rd Cong., 3rd Sess., *Hearings on H.R. 20415 before the House Committee on Agriculture and Report on the Bill*, 255 at 268 (1914).

facilities for public convenience and recreation purposes on up to 5 acres for up to 30 years.[17]

Three unsuccessful attempts to increase the acreage limitation were made between the passage of the original term permit bill in 1915 and 1956 when the acreage limitation was finally raised from 5 to 80 acres. They are described here to demonstrate the fact that Congress was fully informed of the practice of combining term and revocable permits and that the term permit area limitation was never intended to limit the Secretary's power to issue revocable permits.

Between 1917 and 1929 the annual number of visitors to national forests rose from 3,160,000 to 31,758,231.[18] By 1929, 34,195 term and revocable permits were in effect and an unsuccessful effort was made during the 1930's by the Department of Agriculture to increase the term permit acreage limitation and broaden the purposes for which term permits could be issued.[19] In 1931, the Department justified their request for the expanded authority by stating:[20]

> "Experience has proved that 5 acres is insufficient to permit of the proper development of the most modern types of outdoor camps, hotels, resorts, sanitoria, etc. which, in addition to the principal structures, usually require the related use of lands for the various necessary utilities, recreational services, etc. now regarded as essential to such establishments. At present these are provided by the issuance of supplemental terminal permits, which injects an undesirable element of uncertainty of tenure and adds to routine requirements of administration."

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[17] 38 Stat. 1101.

[18] *Hearings before the House Committee on Agriculture, January 26, 27, 28 and February 5, 6, 1931,* 71st Cong., 3rd Sess., Serial V at 63.

[19] H.R. 11637 and S. 4166, 71st Cong., 2nd Sess. (1930); H.R. 16336, S. 5604 and S. 5810, 71st Cong., 3rd Sess. (1931); S. 773, 72nd Cong., 1st Sess. (1931); H.R. 58 and S. 872, 73rd Cong., 1st Sess. (1933); H.R. 6034 and S. 463, 74th Cong., 1st Sess. (1935); and S. 1054, 75th Cong., 1st Sess. (1937).

[20] *Hearings, supra,* note 18, at 62.

Security of tenure, which motivated Congress to pass the original term permit authority, again motivated these attempts to expand the Secretary's power. Data submitted to the Committee to establish the need for the legislation showed that while most permittees would require substantially less than the 80 acres included in the proposed legislation, *many forest uses exceeded the then existing 5* acre term permit limitation and would exceed even the proposed *80* acre term permit limitation were it enacted. (Note that by merely dividing the acreage listed in the Forest Service table by the number of permits, it could be seen that some permits exceeded 400 acres.)

SPECIAL-USE PERMITS IN FORCE
DECEMBER 31, 1929[21]

Permit Purposes	*No.*	*Acres*	*Approx. Average Permit Acreage*[22]
Agriculture & Cultivation	1,198	22,229	19
Airplane Landing, beacons and hangars	15	2,460	164
Distillation Plant	1	120	120
Experimental and Demonstration Area	6	2,468	411
Fish or Fruit Cannery	47	466	10
Fish Hatchery, etc.	106	4,029	38
Fur Farm	224	148,557	663
Hotel and Roadhouse	49	524	11
Mill and Factory Site	29	622	21
Nursery	5	1,102	220
Park	19	9,376	493
Pasture	5,828	1,268,507	218
Playground	20	791	40
Quarry	22	653	30
Reservoir	1,073	111,500	110
Resort and Clubhouse	807	7,604	9
Turpentine or Oil Extracting Still	1	20	20
Watershed	43	338,167	7,864

[21] *Ibid.*, 64.

[22] Derived by dividing total number of permits into total acreage under permit and rounded to nearest whole acre. Computations made by Amici Curiae.

Thus, while new term permit legislation was being sought to increase the amount of acreage covered by any one term permit to 80 acres, there was no suggestion whatsoever that any new term permit authority alone would adequately fulfill the needs for use of forest lands then filled by revocable permits or combined revocable–term permits or that revocable permits for 400, 600, or even 6,000 acre tracts would no longer be valid or issued.

While no legislation was ever enacted during the 1930's, forest usage continued to grow and when legislation was again considered in 1947 to expand the Secretary of Agriculture's authority to issue term permits, some 40,000 term and revocable permits existed.[23] Testifying before a House Agriculture Committee Subcommittee, the Assistant Chief of the Forest Service again informed the Congress that realities of modern forest usage compelled the Forest Service to follow the practice of combining term and revocable permits for areas which "greatly exceed" the 5 acre limit on term permits. He also stated that legislation expanding the term permit authority was necessary to provide the stability to land tenure necessary to adequately finance further development.[24] While the 1947 bill, as introduced, would have applied to all Forest Service lands, the version which finally passed was limited to Alaskan lands only.[25]

Legislation was again introduced in 1953 to remedy the problem of lack of executive authority to provide secure tenure over sufficiently large parcels of national forest land to attract investors and enable them to finance modern recreational developments.[26] The 1953 bill passed the House but was never reported out of the Senate Committee on Agriculture and Forestry.

[23] *Hearings on H.R. 1809 before Subcommittee No. 2 of the House Committee on Agriculture,* 80th Cong., 1st Sess., at 2 (1947).

[24] *Ibid.*, 2-3.

[25] 62 Stat. 100, 48 U.S.C.A. 341.

[26] H.R. 2762, 83rd Cong., 1st Sess. (1953); H. Rep. No. 1742, 83rd Cong., 2nd Sess. (1954).

Legislation to expand the 1915 five acre term permit authority finally passed the Congress in 1956, 70 Stat. 708, and is now contained in 16 U.S.C. 497. In reporting on the 1956 bill[27] both the House Committee on Agriculture and the Senate Committee on Agriculture and Forestry were careful not to confuse authority for term and revocable permits. They set forth the distinction between the two authorities, carefully employing the word "such" to relate the 80 acre limitation only to the term permit authority:[28]

> "The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551). Its authority to issue term permits, and the extent to which *such* authority would be broadened by S. 2216, are shown below: [a table followed]." (Emphasis added)

The day after passage of the 1956 bill by the Senate, Edward Crafts, Assistant Chief of the Forest Service appeared before the House Agriculture Committee to explain the bill and the prevailing practice of the Forest Service with respect to term and revocable permits. The relevant passages are set forth in full to avoid any misinterpretation.[29]

> "Mr. Crafts. Mr. Chairman, we have authority now under the National Forests to give revocable one year permits for any use for any acreage.
>
> "We have certain term authority at the present time.
>
> "We can at the present time give thirty year permits to hotels, and resorts, for five acres. We can also give it to summer homes and stores for thirty years, for five acres.
>
> "We do not have any authority to give term permits for industrial or commercial purposes. What this bill

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[27] S. 2216, 84th Cong., 1st Sess. (1955).

[28] H. Rep. No. 2792; S. Rep. No. 2511, 84th Cong., 2nd Sess. (1956).

[29] *Hearing on General Committee Business before the House Committee on Agriculture*, Vol. 1, July 17, 1956, Harold D. Cooley, Chairman, Presiding. Transcript p. 43-44 (unprinted).

would do would extend the authority for hotels and resorts and facilities for recreational purposes, and let us give permits for eighty acres for thirty years whereas now we can give five acres for thirty years.

"When this committee considered the bill last year, you amended the bill with respect to summer homes and stores, to not expand the acreage from existing authority. That was the change that the committee made in the bill.

"So as the bill now stands, we would have the same authority as we have at the present time which is five acres for thirty years for summer homes and stores. It would give us authority for eighty acres for thirty years for facilities for industrial or commercial purposes, provided the purposes were not inconsistent with the purposes for which the National Forests were established.

"That is what the bill would do."

In response to a question from Representative August H. Andresen regarding an apparent conflict of policy between the 1956 bill generally and its application to Superior National Forest, Mr. Crafts answered:[30]

"That is correct. Mr. Andresen, of course, the Superior bill is a very special situation. We have no parallel situation to that any place else in the National Forest system. It is an unprecedented and unique situation on Superior.

"You are quite correct, that the policy that we are following through the purchase of these resort areas and to make that area a complete wilderness and a new country, is contrary to the general authority which we would have in this bill for non-wilderness areas in the National Forests.

"We have many, many permits for summer homes, stores, resorts, hotels, all sorts of special uses. I have a list of them here, the type of things which average more than five acres.

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[30] *Ibid.*, Transcript p. 44-45.

> "*We have camp and picnic areas, with 17 acres. Those are summer camps. We have many permits for boy-scout camps and girlscout camps. Fish hatcheries, 36 acres; fur farms, 78; mill and factory sites, 48 acres; nurseries, 68; parks and playgrounds, 88 acres; reservoirs, 75 acres; rifle and target ranges, 400 acres; winter sports areas, 400 acres.*
>
> "None of those can we handle on a term permit basis under the existing authority. One reason the term permit is needed is because people who want these permits, want to develop these areas, have difficulty frequently in getting financing from the banks, and getting loans to develop these facilities if they can show that they only have tenure for one year." (Emphasis added)

Thus, the Forest Service again apprised the Committee of its continued practice of linking term and revocable permits where appropriate, even where the total area under such permits might exceed the maximum permissable *term* permit acreage, whether it be 5 acres or 80 acres. In addition, winter sports areas were specifically identified as a type of facility which required large amounts of land and which, *at that time*, ranged to 400 acres in total area. In summary, the purpose of the 1956 legislation, now 16 U.S.C. 497, was not to limit the total area subject to use and occupancy but to expand the areas subject to secure tenure to enhance the prospects of financing the development of the total area.

The situation today conforms to the administrative practices followed by the Secretary of Agriculture for over 40 years. 84 ski areas (listed in Brief Appendix B) exist under permits which are substantially the same as those challenged by the Sierra Club here. Seventy-seven of those ski areas would be essentially "ultra vires" were this Court to strike down the Secretary's authority to issue term and revocable permits as challenged by the Sierra Club.[31] These areas have not sprung up over night but have developed over a

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[31] *Hearings on H.R. 9417 before the Senate Appropriations Committee, Subcommittee on Interior and Related Agencies*, 92nd Cong., 2nd Sess., at 2922 (page proof version) (1971).

number of years in reliance upon the Secretary's authority as described above. In fact, two ski resorts exist on land under revocable permit only. These are Mount Snow in Green Mountain National Forest (911 acres), New Hampshire and Multipor Ski Bowl in Mount Hood National Forest, Oregon (640 acres).

C. Conclusion

The conclusions to be drawn from this review of the development of the term and revocable permit authority as it relates to the Secretary of Agriculture and his management of national forest lands are few and undisputed:

First:

There can be no doubt of the purpose of the term permit authority. It exists for the benefit of those who would construct costly facilities on land owned by the federal government and who must be assured of some security of tenure over a sufficient amount of land before they can prudently undertake their investment. There is not one shred of evidence either by the terms of 16 U.S.C. 497 or in any corner of its long legislative history to suggest that it was enacted, as alleged by the Sierra Club, to limit any other permit authority possessed by the Secretary of Agriculture. To the contrary, 16 U.S.C. 497 expands the Secretary's authority and he has properly utilized this authority in this case and in 84 other cases set forth in Appendix B to this Brief.

Second:

There can be no doubt about the fact that Congress has been fully informed since 1931 of the Secretary of Agriculture's practice of linking term and revocable permits for use and occupancy of the national forests. In fact, in conjunction with enactment of the 1956 legislation, 16 U.S.C. 497, Congress was told that ski areas then under permit ranged as high as 400 acres as shown by Mr. Craft's testimony before the House Agriculture Committee. We submit that under any construction of the doctrine of legislative branch

ratification of executive branch action, Congress must be deemed here to have concurred in the linking of term and revocable permits. *Wells v. Nickles*, 104 U.S. (14 Ott) 444 (1882); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735-736 (1950).

Third:

There can be no doubt about the fact that revocable permits, issued under the authority of 16 U.S.C. 551 are truly revocable. Speculation about whether or not the Forest Service would at some future date withdraw permission from the permittees to use certain lands in Mineral King Valley after they made certain investments is immaterial. The case books are too full of complaints by those disenfranchised from federal lands held under revocable permits for the Sierra Club to seriously claim that revocable permits are not really revocable and hence *ultra vires*. In fact, the very existence of term permit and easement authority today is a testimony to the insecurity of lands held under a revocable permit authority.

IV.

THE SECRETARY OF AGRICULTURE'S AUTHORITY TO PERMIT THE DEVELOPMENT OF A WINTER SPORTS FACILITY IN MINERAL KING VALLEY IS NOT CIRCUMSCRIBED BY LAW

Having once concluded that the Secretary of Agriculture possesses sufficient authority to issue term and revocable permits for the development of winter sports facilities in Mineral King Valley, consideration must be given to whether his authority is circumscribed or limited in any manner. The Secretary's authority is limited in this case only in so far as it may be affected by establishment of the Sequoia National Game Refuge in 1926, 16 U.S.C. 688. Section 688 provides that certain lands including Mineral King Valley:[32]

[32] Full text appears in Brief Appendix A.

> "... are designated as the Sequoia National Game Refuge, and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of the said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided*, That it is the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further*, That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established."

It is evident by the terms of this statute that the game refuge was established for the protection of animals but the inquiry must go further if any useful limits on the Secretary's authority are to be derived. Animals may be protected in a variety of ways including placing them in a zoo or creating an absolute wilderness preserve free of all people. In creating the Sequoia Game Refuge, Congress chose neither to cage the animals nor to enjoin people from enjoying them but rather to prevent people from "hunting, trapping, killing or capturing" them. This method of protection was uniquely tailored to the environs of Mineral King Valley because the safety of not only the animals but also those people already utilizing Mineral King for recreation purposes was at stake. This was made clear by William B. Greeley, Chief Forester, in testimony before the House Committee on Public Lands when legislation to create the game refuge was first considered in 1924:[33]

[33] *Hearings on H.R. 4095 before the House Committee on the Public Lands*, 68th Cong., 1st Sess., at 23-24 (1924).

"The Mineral King area has been left out of the proposed park, primarily because it is a mineralized section. There is a certain amount of mining activity still going on, and those people feel that they have mineral values there which they should be free to prospect for and develop. Since that is not consistent with national park administration, it seems to be the best solution to leave that territory out. It does leave rather a peculiar peninsula in the boundary line, but there will be no very serious difficulty involved in administration.

"There is one feature of the bill which the Forest Service has asked Mr. Barbour to include and which he has included, and that is the creation of a Federal game preserve to cover this peninsula. The land contained in the purple line, now having national park status, is at present under absolute game protection. This much of what is now a game preserve would be thrown out if a boundary change is made. We believe that it is desirable to continue the game protection over this little strip of territory that has had it in the past, and also to extend the game preserve to cover the entire peninsula, for three reasons: In the first place, an enlargement of the game preserve in principle will, we believe, be a good thing as a breeding ground and source of replenishment for the big hunting territory to the south—and I can assure you that the huntsmen of that region will have ample ground for their sport in the Sequoia National Forest, which covers over 2,000,000 acres to the south of this territory. The intent is to enlarge the game preserve within reasonable limits and increase the supply of valuable game animals in that territory.

"Mr. Thomas. What kind of game is found there?

"Mr. Greeley. Very largely California deer. Furthermore, you can readily see that with hunting prohibited within the park boundary around this peninsula, it would be very difficult, if hunting were permitted in the peninsula, to prevent poaching across the park boundaries to the east and west. So, as a practical administrative matter, the proposition will

> be very much simplified if that can be thrown into a game preserve. *The third reason is that in the vicinity of Mineral King is quite an intensely developed recreational area under national forest administration. There are a good many campers in there. There are a good many summer home permits held by people who have constructed summer cabins and who take their families up there for the entire season, and on account of that intensive recreational development we think it is preferable to exclude hunting from the region.*" (Emphasis added.)

Section 688, creating the game refuge, by its terms delegates the management of the game refuge to the discretion of the Secretary of Agriculture. The Secretary has continuously recognized the long standing recreation uses of Mineral King Valley which Col. Greeley identified as existing even prior to 1924. He has sought to exercise his authority through the years in a manner consistent with Section 688 which certainly never contemplated management of the area for any one single purpose.

That this is in fact the case is demonstrated by Secretary Brannan's determination in 1949 that Mineral King was an area which should be managed for public recreation requiring development and substantial improvement pursuant to 36 CFR 251.22.[34] In so designating Mineral King, the Secretary found that recreation was not inconsistent with the Sequoia

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[34]Designation contained on U.S. Forest Service Map entitled "Mineral King Recreation Area, Sequoia National Forest, T. 17S., R 31 E., Mt. Diablo Base and Meridian" and containing the following statement:

> "By virtue of the authority vested in me as Secretary of Agriculture by the Act of June 4, 1897 (30 Stat. 35) and the Act of February 1, 1905 (30 Stat. 628), and in accordance with Regulation U-3(b) (Sec. 251.22, Chapter II, Title 36 C.F.R.) of this Department this area, as shown by this map and legal description, is classified as the Mineral King Recreation Area, and is hereby set apart and reserved for public recreation use and closed to all other occupancy and use except such uses as the Regional Forester May Authorize as being consistent with recreation use. Dated May 13, 1949."

National Game Refuge. Moreover, it should be noted that the objectives of the game preserve have not been achieved by simply building a fence around Mineral King and excluding the outside world. For example, to meet a problem of overpopulation of the deer herd in the area, the Forest Service found it necessary to enter into a "Memorandum of Understanding with the California Fish and Game Commission, California Department of Fish and Game and the National Park Service" on January 14, 1966[35] to control the size of the herd and fulfill its management responsibilities in the Sequoia National Game Preserve.

Another statute, the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.*,[36] reinforces the multiple objective management policies established by Congress for the Mineral King area and pursued by the Secretary.

16 U.S.C. 528 declares that:

> "It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. . . ."

In summary, the limits on the authority of the Secretary of Agriculture must, therefore, be judged very broad indeed. He is under mandate to manage forest lands with a multipurpose objective in mind. His specific guidance in this particular case—the establishment of the Sequoia National Game Refuge—does not constitute an embargo on winter sports activities at Mineral King but rather a mandate to protect animals and people from hunters and trappers. The game refuge does not create a zoo nor does it ordain a virgin wilderness for the exclusive habitation of animals. To infer either as delimiting the parameters of executive authority in

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[35] Entered into pursuant to "Co-operative Agreement, U.S. Forest Service, R-5, and the Department of Fish and Game, State of California," Forest Service Manual §2611.1, R-5 Supplement No. 37, Amended June 1964.

[36] Full text appears in Brief Appendix A.

this instance is to misconstrue the clear meaning of the Secretary's statutory authority.

V.

THE SECRETARY OF THE INTERIOR HAS AUTHORITY TO PERMIT THE CONSTRUCTION OF A TRANSMISSION LINE ACROSS SEQUOIA NATIONAL PARK TO SERVE MINERAL KING

The Sierra Club contends that 16 U.S.C. 45(c), expanding Sequoia National Park in 1926, prohibits the Secretary of the Interior from granting any right-of-way for electric transmission lines through Sequoia National Park without specific authority of Congress. The review of the legislative history of this and related statutes which follow not only demonstrates that the Secretary of the Interior does have ample specific statutory authority to permit the construction of the transmission line, but also confirms the conclusion reached by the Ninth Circuit that the limitation on the construction of transmission lines in Sequoia National Park in Section 45(c) was intended to apply only to transmission lines constructed in conjunction with hydroelectric projects.

There are two statutes which specifically authorize the Secretary of the Interior to grant permission to construct transmission lines across all national parks. First is 16 U.S.C. 79. This statute was one of the earliest statutes (1901) to deal with the issue of rights-of-way over public lands for transmission lines and authorized a form of revocable permit. Section 79 states in part:[37]

> "The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, California for electrical plants, poles, and lines for the generation and distribution of electrical

[37] Full text appears in Brief Appendix A.

> power, . . . *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

The purpose of this legislation was set forth in the Report of the House Committee on Public Lands[38] on the bill which ultimately became Section 79. The Report indicated that the new legislation would bring together in one act the several acts relating to rights-of-way through certain parks, reservations and other public lands and to provide specifically for rights-of-way for electrical power development. It should be noted here that the Sierra Club's further contention that Section 79 is limited by their interpretation of 16 U.S.C. 1 (i.e., the "park purpose" requirement, dealt with more fully, *infra,* Section VI) is simply erroneous. 16 U.S.C. 4 explicitly states that the provisions of 16 U.S.C. 1 shall not modify the provisions of Section 79.

The second source of statutory authority granting the Secretary of the Interior power to permit the construction of transmission lines in national parks is 16 U.S.C. 5. The relevant portion of Section 5 states:[39]

> "The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, ..."

As in the case of the Forest Service term permit authority discussed *supra,* the purpose of this act was to ease the bur-

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[38]H. Rep. No. 1850, 56th Cong., 1st Sess. (1900).

[39]Full text appears in Brief Appendix A.

den of financing construction of transmission lines by authorizing a more secure grant of tenure to the permittee to the land upon which the lines would be placed.[40]

Section 79 and Section 5 leave the Secretary with a choice of the type of permit to issue to authorize construction of transmission lines over public lands. He may issue a revocable permit which would place the permittee at his peril should the permit be revoked or should the lines have to be relocated, or he may issue a term permit which would provide the permittee with a more secure interest in the land transgressed and make the government responsible for the cost of the relocations. The Sierra Club suggests here that only a term permit under 16 U.S.C. 5 would be appropriate due to the investment required for the power line at issue but such a contention is irrelevant. The Secretary has adequate authority to grant either type of permit that he, in his discretion, deems appropriate in the particular situation.

Having determined that the Secretary has sufficient authority to authorize the construction of the power line, a further inquiry is necessary to determine if there are any limits to that authority. In the case of Sequoia National Park only one possible limitation exists—16 U.S.C. 45(c)—a proviso attached to a 1926 statute amending the boundaries of Sequoia National Park, which reads in part as follows:[41]

> "*Provided*, That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress."

The bare language of the statute, stripped of its historical context and read without any understanding of the develop-

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[40]H. Rep. No. 967, 61st Cong., 3rd Sess. (1911).

[41]Full text appears in Brief Appendix A.

ment of hydroelectric power in the United States admits of two interpretations: First, absolutely no transmission line may exist in Sequoia National Park without prior Congressional approval, whether it be used for transmission or even *utilization* of power; or second, no transmission line or any "other works" serving either the purpose of storage or carriage of water or development, transmission or utilization of power (i.e., a purpose associated with a hydroelectric power development) may exist in Sequoia National Park without prior Congressional approval. The correct interpretation is established in the legislative history of Section 45 (c).

Senate 45(c) had its genesis in fears that the Federal Power Act of 1920, 41 Stat. 1063, 16 U.S.C. 791 *et seq.*, which created the Federal Power Commission and conferred upon it authority to license hydroelectric projects on public lands, would result in huge dams being built in national parks. Not without foundation,[42] these fears were first allayed by an amendment to the Federal Power Act in 1921 prohibiting the licensing of projects in national parks without specific Congressional authority. 41 Stat. 1353, 16 U.S.C. 797(a). In an oral report on the pending amendment which ultimately became Section 797(a), Senator Jones explained its purpose as follows:[43]

> "At the last session we passed the water-power bill. It was not signed on the last day of the session. It was supposed of course, to have failed by reason of the failure to be signed, but upon investigation we reached the conclusion that the President had further time to consider the bill.
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> "Upon a conference with the Secretary of the Interior I found that he had objected to the signing of the bill for the reason that it embraced within its terms and gave jurisdiction to the commission over

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[42]The Raker Act of 1913, 38 Stat. 242, authorized the City of San Francisco to construct Hetch Hetchy Dam in Yosemite National Park.

[43]60 Cong. Rec. 403-404 (1920).

national parks. He did not think that this should be done. He thought that no permit for the construction of water power, dams, reservoirs, houses, and so forth, in national parks should be made except by an act of Congress and all the circumstances considered. I assured him that if he would withdraw his objection to the signing of the bill I would introduce a measure at the opening of this session taking the national parks out of the jurisdiction of the Water Power Commission. I, of course, committed no one but myself. Upon that assurance he withdrew his objection, and the bill was signed, and the water-power legislation is now on the statute books.

"This bill was introduced to carry out that assurance given to the Secretary . . ."

The language of Section 797(a) was not clear as to whether or not it applied prospectively and therefore, after 1921, when new national parks were created or additional land was added to existing parks wherein possible hydroelectric projects sites existed, a special clause was attached to the enabling legislation to insure that the hydroelectric licensing authority of the Federal Power Commission did not apply within the limits of any national park. The usual clause, used in at least 15 instances, was:

". . . *Provided*, that the provisions of the Federal Power Act shall not apply to or extend over such lands."[44]

In the case of Sequoia National Park, however, the language used to prohibit hydroelectric licensing, Section 45(c), was

[44]Yellowstone National Park, 16 U.S.C. 21(b); Yosemite National Park, 16 U.S.C. 47(b); Big Bend National Park, 16 U.S.C. 158; Rocky Mountain National Park, 16 U.S.C. 197; Lassen Volcanic National Park, 16 U.S.C. 201(b); Grand Canyon National Park, 16 U.S.C. 221(b); Acadia National Park, 16 U.S.C. 342(b); Hawaii National Park, 16 U.S.C. 391(b-1); Bryce Canyon National Park, 16 U.S.C. 402(e); Shenandoah and Great Smoky National Parks, 16 U.S.C. 403(b); Mammoth Cave National Park, 16 U.S.C. 404(b); Carlsbad Caverns National Park, 16 U.S.C. 407(b); Isle Royal National Park, 16 U.S.C. 408(b); Everglades National Park, 16 U.S.C. 410(b).

different. In spite of this fact, the purpose of Section 45(c) was identical to the purpose of the more frequently used provision set forth above, namely to insulate Sequoia from the threat of FPC-licensed hydroelectric projects. Section 45(c) was not intended to repeal the authority of the Secretary of the Interior to grant rights-of-way for transmission lines under 16 U.S.C. 79 or 16 U.S.C. 5. In fact, the very ambiguity leading the Sierra Club to its erroneous contention here was plainly laid to rest in testimony by a National Park Service representative before the House Committee on Public Lands when the Committee was considering the legislation which is now 45(c):[45]

> "The Chairman. You do not have the ordinary provisions you have in the other bills, that the water power act shall not extend to this park, do you?
>
> "Mr. Demaray. That is covered in that proviso on page 7—
>
> > '*Provided*, that no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as herein constituted, shall be granted or made without specific authority of Congress.'
>
> "That, in effect, is exactly the same.
>
> "The Chairman. Why do they have it in that form? Why do they not use the usual phraseology that it shall not apply? What is the purpose of the language?
>
> "Mr. Demaray. Well, other than to say that Congressman Barbour desired it in this form and as he is the author of the bill we had no objection to stating it in whatever terms he desired to state it.
>
> "Mr. Swing. A mere choice of phraseology. The result is the same.

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[45] *Hearings on H.R. 9387, H.R. 9916 and H.R. 10126 before the House Committee on Public Lands*, 69th Cong., 1st Sess., at 30 (1926).

"Mr. Demaray. Yes; absolutely the result is the same.

"The Chairman. Have you compared it to find out whether it is identical?

"Mr. Demaray. Yes, sir; it was compared in our office.

"Mr. Winter. You mean the effect is the same?

"Mr. Demaray. Yes; the effect."

In summary it seems clear that the only transmission lines that require Congressional approval pursuant to Section 45(c) are those transmission lines that would be subject to Federal Power Commission jurisdiction, i.e. those lines which are part of a hydroelectric power project.[46] Since the transmission line contemplated in the Disney project is not part of a hydroelectric power project, Section 45(c) does not apply.[47]

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[46]The United States Court of Appeals for the District of Columbia Circuit has held that transmission lines that cross lands of the United States but which are not part of a hydroelectric project are not within the authority of the Federal Power Commission and must be licensed by the department having jurisdiction over the public lands in question. With regard to the Secretary of the Interior, the Court stated: "There would seem to be no necessity. . .to take from the Secretary of the Interior authority to determine the use of public lands within his jurisdiction for a transmission line which is not part of a hydro-electric project." *Pacific Power and Light Company v. F.P.C.*, 184 F.2d 272, 274 (D.C. Cir. 1950).

[47]The language of Section 45(c) has been applied once, and then for the purpose for which it was intended. In 1963, in connection with Federal Power Commission re-licensing of it's Kaweah No. 3 Project, the Southern California Edison Company was required to obtain legislation specifically authorizing the Secretary of the Interior to issue a permit for the continued operation, maintenance and use of hydroelectric facilities within Sequoia National Park. See 77 Stat. 70.

VI.

THE SECRETARY OF THE INTERIOR HAS AUTHORITY TO PERMIT THE STATE OF CALIFORNIA TO IMPROVE A ROAD IN SEQUOIA NATIONAL PARK WHICH PROVIDES ACCESS TO MINERAL KING

Congress has given the Secretary of the Interior general authority to make such rules and regulations as he deems necessary or proper for the use and management of the National Parks.[48] In addition, the Secretary has been given specific authority to construct and improve roads and trails in the national parks, 16 U.S.C. 8. Section 8 states:

> "The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior."

Section 8 was enacted to authorize a road building and improvement program in the national parks to compliment the then existing programs in the national forest and other areas of the public domain. At the time of its enactment, practically all national park roads were in a dangerously unsatisfactory condition. Then Secretary of the Interior, Hubert Work, in a letter to the Chairman of the Committee on Public Lands submitting draft legislation which later became Section 8 stated ". . . the existing park roads are in many instances too narrow for safe driving, contain too much adverse grade, and particularly have not the base to withstand the continuous and severe pounding of modern high-powered motor vehicle travel."[49] In confirming this position, the Committee stated in its report at page 4:

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[48] 16 U.S.C. 1, *et seq.*

[49] H. Rep. No. 258, 68th Cong., 1st Sess., at 2 (1924).

> "However, the national parks were set aside for the benefit and enjoyment of the people of this country. They have great scientific and educational value. They should not be regarded as revenue producers, but rather as areas of which this Nation should be very proud. *They should be made more accessible and their roads should be modern, safe highways, suitable for modern means of transportation.*" (Emphasis added.)

The type of construction proposed across Sequoia National Park in this case is the precise type of road improvement construction that was contemplated by Congress when it enacted Section 8. The existing Mineral King road is inadequate for modern motor vehicle travel, too narrow for safe driving, contains too much adverse grade, and it has sharp and dangerous curves.[50] The proposed road is designed specifically to correct these existing problems.

The Sierra Club contends, however, that the proposed Mineral King road does more than improve an existing road and constitutes a totally new road. Without distinguishing between a relocated road and a new road and with no regard for the elementary fact that any modern road improvement involves substantial realignments, the Sierra Club blandly lables the proposed road a "freeway" and proceeds to quarrel with a discretionary government management decision by dredging up self-serving arguments from road battles they have fought elsewhere in the past, and inferring national policy from unrelated legislation.

Before dealing with these contentions it should be clearly understood that Section 8 was enacted specifically to authorize the Secretary of the Interior to improve existing park

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[50]For a description of the existing road, see *Report of Route Studies*, Petitioner's Appendix 58, 60. See also Associated Press news story appearing in *The Washington Post*, July 6, 1971, at p. A2 which discusses the inadequate conditions of a great many national park roads and the danger posed to motorists. The article notes that pressure from conservation groups is one of the greatest stumbling blocks to accomplishing needed improvements.

roads. The Secretary exercised his authority in this case under this Section and decided, after considering alternative proposals, to issue a permit to the State of California to improve the existing road in the manner proposed. His action was fully within his statutory authority. Moreover, it should be born in mind that Sequoia National Park does not exist in a vacuum. It is therefore important in determining what use is to be made of the park land to take into account the total environment in which the park exists. Of particular significance in comprehensive park management are the recreation needs and available recreation facilities within a region. Thus, where national parks and national forests adjoin, the regional recreation resources must be managed in some cohesive manner.[51] Here, the effect of the Sierra Club's contention is to deny the government the opportunity to use two of its parcels of land in such a way that the objectives for which each parcel was reserved are enhanced.

The Sierra Club's primary objection to the road is that irrespective of the Secretary's authority to permit the construction of park roads, his authority is limited by the park purpose requirement of 16 U.S.C. 1.[52] The Sierra Club simply misses the mark when they infer from the very general language referred to as the "park purpose language" that somehow roads through parks are banned. There is no law anywhere to support this contention and in point of fact reference to any ordinary filling station road map demon-

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[51] The Forest Service and the Park Service have formalized their cooperative research and planning efforts to insure optimum attainment of the missions of both agencies. *Compilation of Administrative Policies for the National Parks and National Monuments of Scientific Significance* (*National Area Category*), U.S. Department of the Interior, National Park Service (Rev. 1970), at 31-32.

[52] The two park purposes set forth in 16 U.S.C. 1 are ". . . [1] to conserve the scenery and the natural and historic objects and wildlife therein and [2] to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

strates that there are many instances where roads cross national parks as part of a state or U.S. highway system.[53]

Quite the contrary, 16 U.S.C. 1 requires the Park Service to so regulate national parks that the measures they take "conform to the fundamental purpose of said parks . . ." In this case at least three studies on the road and its impact were made and considered by the Department of the Interior prior to reaching its decision to approve the road.[54] The mere fact that the proposed road would serve purposes beyond an exclusive park purpose does not, as contended, prevent the Secretary of the Interior from exercising his authority to permit construction of the road.

The Sierra Club's second contention is that 16 U.S.C. 8 permits only the Secretary to build and improve roads and that he may not delegate his authority to build and improve roads to the State of California. This argument is without merit because the authority delegated here is not of a quasi-legislative nature and the means chosen to accomplish the actual construction are for the Secretary to determine in his discretion. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

It is next claimed that the House Committee on Interior and Insular Affairs in dealing with the establishment of the Padre Island National Seashore in 1962 somehow established a general Congressional prohibition against Section 8 roads through areas under the control of the National Park Service if they are used to "connect with existing road systems." This claim misinterprets the events surrounding the Padre Island legislation.

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[53]For example: Washington Route 123 through Mt. Rainier National Park; U.S. Route 101 through Olympic National Park; California Route 198 through Sequoia National Park; California Routes 120 and 41 through Yosemite National Park; California Route 89 through Lassen Volcanic National Park; U.S. Route 26-89-187 and U.S. Route 26-89-287 through Grand Teton National Park; U.S. Routes 20 and 89 through Yellowstone National Park; U.S. Route 34 through Rocky Mountain National Park; Utah Route 15 through Zion National Park.

[54]The studies are reproduced at Petitioner's Appendix 57, 83, 140.

As introduced, according to the House Report, the House version of the bill *required* the National Park Service to construct a road the full length of the proposed National Seashore.[55] According to the report, this requirement would impute to the Park Service a function that does not properly belong to it. With this we fully agree. The Park Service should never be *required* to construct a road through a national park or national seashore since, as pointed out in the report, such a road might spoil the very assets which the creation of the park was intended to preserve. Nowhere, however, does this report or any other legislation prohibit the Park Service from constructing a "through" or "connecting" road in a park when the Service determines that public use calls for such construction. The House report specifically states at page 2717:

> "The Park Service will be able, under its general authority, to supplement these outside roads [access roads from the North and South outside the seashore] with others inside the seashore as public use of the seashore indicates the need therefore."

The Sierra Club's final contention is that the Department of the Interior has violated its own rules in failing to conduct hearings on the proposed improvement of the Mineral King road. This contention is based upon regulations adopted by the Secretary of the Interior on January 29, 1969, 34 Fed. Reg. 19. These regulations would have required a public hearing whenever a proposed project involved improvement of an existing road and the project would have had a substantial social, economic, or environment effect. These regulations were revoked, however, by the Secretary of the Interior on April 21, 1969, 34 Fed. Reg. 6985.

The Sierra Club argues that the revocation was ineffective because it did not conform to a number of provisions of the Administrative Procedure Act relating to the promulgation

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[55] H. Rep. No. 2179, 87th Cong., 2nd Sess. (1962), U.S. Code Cong. & Ad. News 2717 (1962).

of regulations. This contention is wrong for two reasons. First, the procedural requirements set forth in Section 4 of the Administrative Procedure Act for promulgating regulations, 5 U.S.C. 553, do not apply in cases where what is involved is "a matter relating to agency management of personnel or to public property, loans, grants, benefits or contracts." 5 U.S.C. 553(a)(2). *Duesing v. Udall,* 350 F.2d 748, 752 (D.C. Cir. 1965) cert. den., 383 U.S. 912 (1966).

Second, the argument fails in logic. Either the promulgation and revocation were effective in spite of Administrative Procedure Act requirements, or *neither* the promulgation *nor* the revocation were effective because the same procedures were followed to promulgate the regulations as to revoke them. Thus, the regulations requiring a hearing are of no force and effect.[56]

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Ninth Circuit should be affirmed.

Donald R. Allen
Patrick H. Mitchell

Attorneys for Amici Curaie

August, 1971

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[56]It should be noted that the Secretary has recently adopted a policy whereby regulations calling or revoking a hearing will in the future be subject to procedures set forth in the Administrative Procedure Act. "Public Participation in Rule Making," 36 Fed. Reg. 8336 (May 4, 1971).

APPENDIX A

16 U.S.C. 5

The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided*, That such right-of-way shall be allowed within or through any national park or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for non-use for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there has been issued a permit, prior to March 4, 1911, for any of the purposes specified herein under any law existing at that date, may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations making application under the provisions of this section subsequent to said date. (Mar. 4, 1911, ch. 238, 36 Stat. 1253; May 27, 1952, ch. 338, 66 Stat. 95.)

16 U.S.C. 45c

Nothing contained in section 45a or 45b of this title shall affect any valid existing claim, location, or entry established prior to July 3, 1926, under the land laws of the United States, whether for homestead, mineral, right-of-way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided*, That under rules and regulations to be prescribed by him the Secretary of the Interior may issue permits to any bona fide claimant, entryman, landowner, or lessee of land within the boundaries established by sections 45a–45e of this title to secure timber for use on and for the improvement of his land; and he shall also have authority to issue, under rules and regulations to be prescribed by him, grazing permits and authorize the grazing of livestock on the lands within said park at fees not to exceed those charged by the Forest Service on adjacent areas, so long as such timber cutting and grazing are not detrimental to the primary purpose for which such park is created: *Provided*, That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress. (July 3, 1926, ch. 744, § 3, 44 Stat. 820)

16 U.S.C. 79

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reser-

voirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted under this section for any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given under this section for telegraph and telephone purposes shall be subject to the provision of sections 1-6, and 8 of Title 47, regulating rights-of-way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park. (Feb. 15, 1901, ch. 372, 31 Stat. 790; Mar. 4, 1940, ch. 40, §2, 54 Stat. 43.)

16 U.S.C. 497

The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or

maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity. The authority provided by this section shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests. (Mar. 4, 1915, ch. 144, 38 Stat. 1101; July 28, 1956, ch. 771, 70 Stat. 708.)

16 U.S.C. 528

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528-531 of this Title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest

lands or to affect the use or administration of Federal lands not within national forests. (Pub. L. 86-517, §1, June 12, 1960, 74 Stat. 215.)

16 U.S.C. 529

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528-531 of this title. (Pub. L. 86-517, §2, June 12, 1960, 74 Stat. 215.)

16 U.S.C. 530

In the effectuation of sections 528-531 of this title the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests. (Pub. L. 86-517, §3, June 12, 1960, 74 Stat. 215.)

16 U.S.C. 531

As used in sections 528-531 of this title the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the

land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land. (Pub. L. 86-517, §4, June 12, 1960, 74 Stat. 215.)

16 U.S.C. 688

All parts of township 17 south, ranges 31 and 32 east, and township 18 south, range 31 east, Mount Diablo base and meridian, which are north of the hydrographic divide passing through Farewell Gap, and which are not added to and made part of the Sequoia National Park by the provisions of sections 688-689d of this title, are designated as the Sequoia National Game Refuge, and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of the said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided*, That it is the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further*, That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established. (July 3, 1926, ch. 744, §6, 44 Stat. 821; June 25, 1948, ch. 645, §13, 62 Stat. 861.)

APPENDIX B

SKI AREAS UNDER TERM AND REVOCABLE PERMIT SIMILAR TO PROPOSED MINERAL KING PERMITS*

STATE AND AREA NAME OR PERMITTEE

Arizona: Arnal Corporation

California:

- Heavenly Valley
- Sierra Ski Ranch
- June Lake Development Co.
- Lakeshore Resort
- Mammoth Mountain Ski Area
- Snow Valley, Inc.
- Snow Summit Ski Corp.
- Moonridge Mountain Estates, Inc.
- Weirick and Company
- Dodge Ridge Corp.
- Sugar Bowl Corp.
- Auburn Ski Club
- Alpine Meadows of Tahoe
- Mount Reba
- Pinecrest Lodge

Colorado:

- Arapaho Basin
- Aspen
- Aspen Highlands
- Breckenridge
- Buttermilk
- Copper Hill
- Crested Butte
- Geneva Basin
- Lake Eldora
- Loveland Valley and Loveland Basin
- Monarch
- Mount Werner
- Pikes Peak
- Powderhorn
- Purgatory
- Snowmass
- Sunlight
- Vail
- Winter Park
- Wolf Creek

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*Source: U.S. Forest Service, *Hearings on H.R. 9417 before the Senate Appropriations Committee, Subcommittee on Interior and Related Agencies*, 92nd Cong., 2nd Sess. (1971), Page Proof page number 2922-2923.

Montana:

- Dillon Ski Club
- Grizzly Peak
- Kings Hill
- Missoula Snow Bowl
- Bridger Bowl
- Big Mountain

Nevada:

- Heavenly Valley
- Lee Canyon

New Hampshire:

- Wildcat Mountain
- Loon Mountain
- Waterville Valley
- Mount Attitash

New Mexico:

- Taos Ski Valley
- Lake Peak Corp., Santa Fe Ski Basin

Idaho:

- Bogus Basin
- Skyline
- Brundage Mountain
- Magic Mountain
- Schweitzer Basin

Maine: Evergreen Valley

Michigan: Big M

Minnesota: Lookout Mountain

Oregon:

- Spout Springs
- Mount Ashland
- Mount Hood Meadows
- Hoodoo Ski Bowl
- Arbuckle Mountain

South Dakota: Stewart Slope

Utah:

- Alta-Snowbird
- Beaver Mountain
- Snow Basin
- Brian Head

Vermont:

- Haystack Mountain
- Sugar Bush Valley

Washington:

- Hyak
- Mission Ridge
- Snoqualmie Summit
- Stevens Pass
- White Pass
- Mount Pilchuck
- Crystal Mountain
- Alpental

Wyoming:

- Antelope Butte
- Meadowlark
- Sleeping Giant
- Fred's Mountain
- Snow King Mountain Teton Pass
- Jackson Hole